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Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 715 and 716

B. B. B. CONSTRUCTION CORPORATION,

Petitioner,

—against—

THE AETNA CASUALTY AND SURETY COMPANY,

Respondent.

Two Cases

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

M. CARL LEVINE, ~~MORGULAS & FOREMAN~~,
Attorneys for Respondent.

DAVID MORGULAS,
Of Counsel.

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Opinion Below

The opinion of the U. S. Court of Appeals for the Second Circuit (R. 151, 157) has not as yet been officially reported.

Jurisdiction

Jurisdiction of this Court is invoked by the petitioner under the provisions of Title 28, Section 347 of the United States Code (Section 240 of the Judicial Code) and Title 28, Section 350 of the United States Code.

Questions Presented

Petitioner would have it appear that important questions of law are presented by the decision of the Court

below. Naturally, that claim would be made otherwise there would not have been even a pretense for the filing of the instant petition. The case, however, is *sui generis.* It does not involve the general question of whether a surety can stop the running of interest by giving a bond under the Federal Interpleader Act, nor did the Court below make any such determination. On the contrary, all that the Court below determined was that under the extraordinary circumstances herein involved the surety was not in default at any time, and inasmuch as interest does not begin to run until there is a default in the performance of the condition of the bond under the New York State Statute, which governs this case, the surety could not be charged with interest. Perhaps it is best to state the question in the concluding language of the Court of Appeals opinion (R. 154-155) *viz*:

> "Here the bond was so filed with explicit approval of this district judge. Indeed defendant asserts that it asked the judge to require the deposit of money; while plaintiff quotes his unreported decision approving the $100,000 bond as adequate, saying 'that here there is no question of the financial ability of the plaintiff,' and pointing out that plaintiff, in addition to filing the bond, had already paid out money to the mechanics and laborers who had claims, and had made, and was attempting to make, other payments to claimants. In view of this decision we do not think the judge can now appropriately find the surety in default in following the option expressed in the Act itself and his own directions and findings. The case is therefore one where the surety never having been in default cannot be held for interest. *American Surety Co.* v. *Lawrenceville Cement Co., supra; United States* v. *Anchor Warehouses,* 2 Cir., 92 F.

2d 57, certiorari denied *Fidelity & Casualty Co. of New York* v. *United States*, 302 U. S. 755. The claim must be dismissed".

Statement

The petition contains such a distorted statement of the facts that we are compelled to set the same forth at considerable length so that this Court may have a clear picture of the special circumstances that confronted the Court of Appeals.

On February 25, 1943, the United States entered into a contract with a concern known as Leo Construction Co., Inc. (hereinafter referred to as the "Bankrupt") for the construction of two warehouses at Rome, New York, at the price of $532,918.60. As required by the Miller Act (40 U. S. C. A. Section 270-a *et seq.*) the bankrupt obtained and filed a payment bond executed by the respondent in the sum of $266,459.30 (67). After the bankrupt had performed part of its contract it defaulted leaving unpaid workmen, subcontractors and material men (69). On July 15, 1943, the United States terminated the contract and relet the work to others (69-70). About two weeks later an adjudication in bankruptcy followed (69).

On or about December 10, 1943, the petitioner and other claimants brought suit against the respondent demanding payment under the respondent's Miller Act Bond, and many other claimants threatened similar actions (70). By December 14, 1943, total claims of $502,979.72 had already been filed against the respondent, with its payment bond limited to $266,459.30 and threats of additional actions and claims. Under these conditions, respondent commenced the instant interpleader action, making all then known claimants defendants. At the same time respondent moved to stay all separate actions and consolidate them with the

interpleader action so that all claimants having any right under the respondent's payment bond could be brought in and a determination had of all claims (71). On May 2, 1944, the District Court granted the respondent's application for an injunction *pendente lite* and ordered all actions consolidated with the interpleader action. It is noteworthy that after respondent commenced the action, 28 additional claimants, totaling $38,405.05, became parties, making the total claims then asserted in the amount of $541,388.77 (86) against respondent's bond of $266,459.30. It is also of the utmost significance that the time for the filing of additional claims was still open as the Comptroller General of the United States had not as yet certified the date of final settlement. Under U. S. C. Title 40 Section 270-c any claimant had a right to bring an action under the payment bond within one year of the date of final settlement as certified by the Comptroller General. It was not until *June 25, 1948,* that the Comptroller General certified the date of final settlement as *February 26, 1948* (126). Obviously respondent's bond was insufficient to pay the claimants 100% of their claims unless the claims were reduced and the respondent successful in recovering a substantial amount from the Government as the balance payable on the defaulted contract.

Promptly after the consolidation order was signed Aetna completed agreements with all conceded Miller Act claimants (other than petitioner) paying them 41% of the amount of their claims as temporarily agreed upon with the understanding that when the actual amounts were determined further percentages would be paid to the limit of Aetna's bond plus any amounts realized from the Government until the claimants had received 100% of all their claims. All claimants, other than petitioner, waived any claim they might have had to interest and assigned their claims to respondent so as to enable it to carry on its

action in the Court of Claims (71, Exhibit G). Petitioner's position at this juncture is highly significant. It at first refused to cooperate in any way electing to play the role of the proverbial dog in the manger.

Petitioner apparently realized that unless respondent had an assignment of its claim respondent might find difficulty in asserting the claim to the contract balance which was the subject of the Court of Claims action. Finally, however, petitioner saw the light of day and executed a qualified assignment of its claim to the respondent which enabled respondent to continue its action in the Court of Claims without question and at the same time petitioner received the same 41% partial payment of its claim as all other claimants received. *Thus by November 24, 1944, plaintiff had paid $176,263.43 against its bond of $266,459.30* (72-73). A year later it paid an additional $19,243.05, and on October 26, 1946 an additional $19,243.05 making total payments to October 26, 1946 in the amount of $215,749.53. *At no time could the entire amount of the bond be paid because the time was still open for new claimants to assert their rights against the bond.* Respondent in the meantime was endeavoring to reach the Government fund.

There were three obstacles.

(1) The Bronxville Trust Co. had an all money assignment from the bankrupt on which it claimed $59,077,.54. This claim respondent succeeded in reducing in half by compromise.

(2) The Trustee in Bankruptcy claimed the fund. This respondent overcame by agreement to pay the Trustee's and Referee's fees and commissions plus $5,000 to the Trustee's attorney.

(3) Government tax claims for over $150,000, which respondent finally compromised at about $22,000.

Thus by February 26, 1948, the respondent had succeeded in disposing of all adverse claims to the Government funds and on June 17, 1948 respondent received $160,124.81 from the Government. It immediately paid the balance of its bond to the claimants and applied so much of the Government fund as was necessary so that all claimants received 100%. Thus, the following was the final result brought about at the sole expense of respondent:

Total Miller Act Claimants including laborers —as finally reduced		$403,331.31
Full amount of Aetna Bond paid to Claimants		266,459.30
Deficit to claimants after payment in full of Bond amount		$136,872.01
Amount of salvage received by Aetna from the Government was	$160,124.81	
The following sums come out of said salvage:		
To Trustee's attorney	$5,000.00	
Trustee's commissions	1,601.25	
Commissions of Referee	3,202.50	
Total	9,803.75	
Leaves balance of salvage	$150,321.06	
Paid by respondent to claimants their deficit of	136,872.01	
Leaving balance to respondent	$13,449.05	

At page 6 of its petition petitioner suggests that it has been injured because respondent was permitted to retain the above sum of $13,449.05 although petitioner received no interest. Both Courts below answered that contention by pointing out the unquestioned expenses and legal fees of the respondent as being far in excess of the balance realized. Suffice it to say that every claimant most substantially benefited by what the respondent did.

If respondent could have been relieved of its bond obligation by a deposit in Court, it is doubtful whether the necessary contests between the 77 claimants would have been as successful in chopping away exaggerated or improper claims as was respondent. Certainly 77 litigants in contest with each other would have caused great havoc and expense to the claimants. The claimants had no rights against the Government. If the Trustee would have had any success in his action against the Government, the claimants would have had to abide contests of other creditors in the Bankruptcy Court before getting any relief. As it was, all claimants, including petitioner, received 100% of their claims.

Under the foregoing circumstances the Court of Appeals found that respondent did everything it possibly could and that it was never in default so as to commence the running of interest.

Reasons for Denying Application for Writ

Petitioner contends that the decision of the Court of Appeals is in conflict with the applicable decision of this Court in *Illinois Surety Co.* v. *Davis*, 244 U. S. 376. Petitioner is completely in error. All that this Court decided in *Illinois* v. *Davis* (*supra*), was that any question pertaining to liability for interest in a Heard Act case must be

determined by the law of the particular state where the work was performed. There never was any question of that rule, and in fact the Court of Appeals specifically stated (R. 153):

> "The parties and the court below appear to be in accord that the surety's liability for interest must be determined by the law of New York, the state where the contract and the bond were made; and we are not disposed to question this, since the Miller Act contains no specific provisions as to it. See *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376."

The real question decided by the Court of Appeals was that under New York Law the facts clearly warranted a denial of interest. It is highly significant that the petitioner presently makes no argument that the Law of New York requires the imposition of interest. In the Court of Appeals the petitioner had the temerity to suggest that the New York law was the same as that of Illinois, but, of course, there was no merit whatever to that statement as the New York law on the question of interest is entirely dissimilar to that of the State of Illinois. It is noteworthy that no contention is now made by the petitioner as to the similarity between the New York law and the Illinois law. In speaking of the New York Law, the Court of Appeals said:

> "At any rate, under it interest does not begin to run until there is a default in the performance of the condition. N. Y. Civil Practice Act Sec. 160. Furthermore it is stated: 'In this state, a surety on a bond given pursuant to statute * * * is chargeable with interest, not from the default of the principal, but from the time when he could have safely paid the same

providing he then unjustly withholds it.' Tuzzeo v. American Bonding Co. of Baltimore, 226 N. Y. 171, 178, 123 N. E. 142."

It was in the same *Tuzzeo* case that the New York Court of Appeals had laid down the law with respect to the allowance of interest, stating at page 179:

"The allowance of interest is sometimes determined upon consideration of equity and natural justice. (Woerz v. Schumacher, 161 N. Y. 350; Brainard v. Jones, 18 N. Y. 35; Blum v. Mayer, 189 N. Y. 153, 158.)"

All claimants could not have been ascertained until one year after February 26, 1948, the date of final settlement fixed by the Comptroller. It was never legally safe to pay before then. Section 270b (a), Title 40 U. S. C. A., provides that "all who furnish labor or material shall have the right to sue on the payment bond for the balance unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment," etc. Subdivision (b) limits the period of the commencement of such action to one year "after the date of final settlement of such contract." It is also highly significant that the statute says nothing about recovery of interest, that is why it was necessary to apply New York law.

Where the claims of suppliers exceed the amount of the bond indebtedness, each supplier's claim is only for the proportion of the bond amount that such claim bears to the total claims. There was no way of knowing, by any form of computation, what the debt to any supplier would be, until the claims of all suppliers were known. It is not who comes first or last—the Statute says that all are to be paid by the same bond, and the total amount of all claims

must first be known, or be capable of being computed, before the Surety can pay its bond debt and be discharged.

In an action under the Miller Act, the Court cannot bar any claim and anyone supplying labor and material has the right to bring an action up to one year after the date of final settlement. The fixing of that date is the function of the Comptroller General of the United States and not the Court. Thus, the payment of the money into Court would have benefited no one and would have relieved no one. As a matter of fact, the Court could not order any distribution as it had no right to impose any risks on the surety until the expiration of the statutory period.

The respondent could never have relieved itself of its bond obligation to any claimant who filed within the statutory period. Had respondent deposited the money in Court, it could not act as a bar to any such claim.

It is respectfully submitted that the Court of Appeals properly considered the history of the instant case and the very opinion of the District Court Judge in the instant case. To begin with, the District Court Judge had refused to order a deposit when the petitioner originally requested it, saying:

> "It is suggested that the plaintiff be required to deposit the full amount of the payment bond in this Court as a condition to the granting of an injunction pendente lite. Here there is no question of the financial ability of the plaintiff. The plaintiff has in fact filed a bond herein in the amount of $100,000., conditioned upon its compliance with the future orders and decrees of this Court. It has already paid about $18,000. to mechanics and laborers, who have or had claims under

the bond, and it appears that the plaintiff has made and is attempting to make other payments to claimants." (Unreported.)

Later when the same Judge considered what respondent ultimately accomplished he stated (R. 141):

> "If Aetna had been relieved of liability by payment into court, and abandoned its efforts to adjust the claim with the government, it would be a matter of speculation as to whether the amount so deposited, plus the fund obtained from the government, would have been sufficient to pay the creditors in full. Certainly there would have been additional attorneys' fees and expenses, since the Aetna makes no charge therefor, but again we are asked to deal with the probabilities or possibilities which are not the measure of the obligation of the bond. The result accomplished for all Miller Act claimants was good, but the obligation is unchanged."

There is little wonder, therefore, that the Court of Appeals, commenting on the lower Court's action said (155):

> "In view of this decision we do not think the judge can now appropriately find the surety in default in following the option expressed in the Act itself and his own directions and findings. The case is therefore one where the surety never having been in default cannot be held for interest. American Surety Co. v. Lawrenceville Cement Co., supra; United States v. Anchor Warehouses, 2 Cir., 92 F. 2d 57, certiorari denied Fidelity & Casualty Co. of New York v. United States, 302 U. S. 755. The claim must be dismissed."

The fact is that there is nothing in the Miller Act which obligates respondent to the immediate payment of any part of the claim where the claims exceed the amount of the bond and the time for the filing of claims has not expired. There is nothing in the Miller Act which authorizes a deposit of the monies in Court so as to relieve the Surety. In fact, it would have been sheer speculation at any time prior to the expiration date for the filing of the claims for the Court to order any payment if the amount of the bond was deposited in Court. It is more than idle speculation to even suggest that the Court would have ordered any payment without respondent's consent. It was for that very reason that the Court said on the granting of the motion for an injunction "this Court does not feel that it should interfere with the voluntary liquidation of plaintiff's liability under the bond, *undertaken, of course, at its own risk.*" (Unreported.) (Italics ours.) The payments that were made by respondent were made at its own risk and there would have been no justification for the Court in assuming or imposing such a risk on respondent without its consent.

A case directly in point is *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed. 717, where the surety company had, as in our case, furnished a statutory bond on a federal job conditioned for the payment of labor and materials. The contractor failed. Claims were then made exceeding the penal sum of the bond. Facing many suits, the surety company filed an equity action, expressing itself as willing to pay the penal amount of its obligation, and, by its Bill in Equity, asked the Court's aid in ascertaining to whom payment should be made. The Court entertained the Bill in Equity and sent the case to a Master to ascertain

in what manner the claims should be recognized. At page 720 the Court said:

> "Inasmuch as the case shows that the complainant has at all times been ready to discharge the entire amount of its penal obligation as soon as it could be ascertained to whom it should be paid, it cannot now be held in default, and therefore it will be entitled to be discharged on a payment of the principal without interest, unless further in default at some subsequent stage of this suit."

The decision is important, in that it holds that a surety which is ready to discharge the entire amount of its penal obligation as soon as it can be ascertained to whom it should be paid, is not in default of its bond contract and is not chargeable with interest.

At page 11 of the instant petition, petitioner says:

> "The Court of Appeals said that but for the Interpleader Act of 1936, petitioner would have been entitled to interest" (P. 156).

The reference is wholly inaccurate because the Court made no such statement at page 156 nor did it make such a statement at any other part of its opinion. Petitioner's unjustified statement is in line with its apparent effort to make it appear that the opinion of the Court of Appeals involved a general interpretation of the Interpleader Act or the Miller Act. Whether or not the Interpleader Act requires interest is immaterial, since the real question is whether the New York State Law requires the award of interest where it is evident that the surety is not in default of the condition of its bond and where it is further con-

ceded that the surety not only did an excellent job but that every equity speaks in favor of the surety. Bearing in mind that the Court of Appeals of the State of New York stated in the *Tuzzeo* case, upon which petitioner originally relied, that the question of interest is sometimes determined upon consideration of equity and natural justice, it is quite clear that the Court below came to a proper conclusion in applying the law of the State of New York to the facts of this case.

It is respectfully submitted that the Interpleader Act as such is not involved as the law which the Court applied is as old as the doctrine enunciated in *Amercan Surety* v. *Lawrenceville Cement Co.*, 110 Fed. 717, the principles of which have been consistently followed whenever the question arose.

It is, therefore, respectfully submitted that this case is clearly *sui generis* and involves no general principles which require review by this Court.

It is respectfully submitted that the petition for writ of certiorari should be denied.

May 2nd, 1949.

M. Carl Levine, Morgulas & Foreman,
Attorneys for Respondent.

David Morgulas,
Of Counsel.

APPENDIX

Sec. 160, N. Y. Civil Practice Act

ACTION UPON A PENAL BOND. A bond in a penal sum, executed within or without the state and containing a condition to the effect that it is to be void upon performance of any act, has the same effect, for the purpose of maintaining an action or special proceeding or two or more successive actions or special proceedings thereupon, as if it contained a covenant to pay the sum or to perform the act specified in the condition thereof. But the damages to be recovered for a breach or successive breaches of the condition, cannot exceed, in the aggregate, the penal sum, except where the condition is for the payment of money; in which case, they cannot exceed the penal sum, with interest thereupon from the time when the defendant made default in the performance of the condition.